IN THE SUPREME COURT OF THE STATE OF MISSOURI

Case No. SC92805

BOARD OF MANAGERS OF PARKWAY TOWERS CONDOMINIUM ASSOCIATION, INC., a Missouri Nonprofit corporation,
Respondent,

v.

TRISH CARCOPA,
NICOLE CARCOPA,
OPTION ONE MORTGAGE, and
UNITED STATES OF AMERICA

OPTION ONE MORTGAGE CORPORATION,
Appellant.

Appeal from the Circuit Court of Jackson County, Missouri,
Hon. Robert M. Schieber

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

The action at issue in this appeal arises from a suit brought by a condominium association for delinquent assessments under the Missouri Uniform Condominium Act and involves the statutory interpretation of §448.3-116 R.S.Mo. as to whether it states that a condominium association's lien has complete priority over a prior recorded refinance deed of trust. Further, this case challenges the constitutionality of said §448.3-116 R.S.Mo. as being unconstitutionally vague and ambiguous as its provisions are not clearly stated or defined. As this appeal concerns the constitutionality of a statute, the Supreme Court has original jurisdiction pursuant to Article V, Section 3 of the Missouri Constitution. Mo. Const. Art. V, §3.

STATEMENT OF FACTS

This appeal, and the underlying suit, concerns a condominium unit, commonly known and numbered as 4545 Wornall Rd., #LO-2, Kansas City, Missouri 64111, and more fully described as follows:

> UNIT NO. LO-2, PARKWAY TOWERS CONDOMINIUM, A SUBDIVISION IN KANSAS CITY, JACKSON COUNTY, MISSOURI, ACCORDING TO THE RECORDED PLAT FILED ON AUGUST 3, 1973, AS DOCUMENT NO. K-202910, IN BOOK K-33, AT PAGE 97 AND

THE DECLARATIONS FILED ON AUGUST 15, 1973, AS DOCUMENT NO. K-204009, IN BOOK K0461, AT PAGE 133, TOGETHER WITH AN UNDIVIDED INTEREST IN THE COMMON ELEMENTS IN PARKWAY TOWERS CONDOMINIUM ATTENDANT THERETO, AS SET FORTH IN THE SAID DECLARATION.

(hereinafter referred to as the "Property"). Legal File ("L.F.") at 7. Trish Carcopa initially purchased the Property on or about January 23, 2004. L.F. at 112. Trish Carcopa acquired title to the Property by way of Warranty Deed, dated January 23, 2004 and recorded January 29, 2004 as Instrument No. 2004K0006546 in the Office of the Recorder of Deeds for Jackson County, Missouri. L.F. at 104, 112. On June 23, 2006 Trish Carcopa executed a Quit Claim Deed, whereby she conveyed the Property to Trish Carcopa, a Single Person and Nicole A. Carcopa, a Single Person. L.F. at 15. Said Quit Claim Deed was recorded July 17, 2006 as Document No. 2006E0058825 of the Jackson County Records. L.F. at 15.

On June 23, 2006, Nicole A. Carcopa executed an Adjustable Rate Note ("Note"), in the principal amount of $164,200.00. L.F. at 80. Said Note was secured by a Deed of Trust, dated June 23, 2006, executed by Nicole A. Carcopa, a single person, and Trish Carcopa, a single person, in favor of H&R Block Mortgage Corporation and recorded July 17, 2006 as Document No. 2006E0058826 of the Office of the Recorder of Deeds for Jackson County,

Missouri. L.F. at 80. Said Note and Deed of Trust were a refinancing mortgage and were subsequently assigned to Option One Mortgage Corporation (hereinafter alternatively "Appellant" or "Option One"), as evidenced by an Assignment of Deed of Trust, dated August 21, 2006 and recorded September 12, 2006 as Document No. 2006E0089891 of the Office of the Recorder of Deeds for Jackson County, Missouri. L.F. at 81. American Home Mortgage Servicing, Inc. subsequently became the holder of the Note and Deed of Trust, as stipulated by the parties. L.F. at 193. After trial and the case was submitted to the court, American Home Mortgage Servicing Inc. changed its name to Homeward Residential, Inc. and Homeward Residential, Inc. is the present Appellant. *See* Third Amended and Restated Certificate of Incorporation, attached to the Appendix at A65.

On December 31, 2007, Respondent Board of Managers of Parkway Towers Condominium Association (hereinafter alternatively referred to as "Respondent" or "Condo Association") recorded its Assessment Lien with the Recorder of Deeds for Jackson County, Missouri as Instrument No. 2007E0163876. L.F. at 7, 19. Pursuant to said Assessment Lien, Trish and Nicole A. Carcopa (hereinafter collectively referred to as the "Carcopas") owed dues and assessments as of December 28, 2007 in the amount of $6,229.03. L.F. at 19. Said recorded Assessment Lien also attempted to assert a lien for future assessments that would go unpaid. L.F. at 19. All the assessments that are at issue herein arose after the

recording of Appellant's refinance deed of trust. L.F. at 56-58. At trial, Respondent claimed that it was owed the sum of $78,144.64 in assessments and fines and that said assessments and fines are a first lien on the Property. Transcript ("Trans.") at pg 41, lines 2-10.

On April 27, 2010, Respondent brought its petition to judicially foreclose for failure of the Carcopas to pay their condominium assessments and dues. L.F. at 6. Respondent asserts that it has a first and prior lien on the Property. L.F. at 11. Respondent filed its motion for partial summary judgment, asserting that Respondent had a superior lien to that of Appellant's Deed of Trust. Appellant denied same. The trial court entered partial summary judgment in favor of Respondent, holding that Respondent's lien for condominium association dues was superior to Appellant's Deed of Trust. L.F. at 155. Appellant filed its Motion for Reconsideration, asserting that the trial court misinterpreted the statute and asserting that §448.3-116 was unconstitutional. L.F. at 157. The trial court denied said Motion of Reconsideration. L.F. at 175. The case went to bench trial on April 24, 2012 on stipulated facts and the testimony of a witness for Respondent. Trans. at 4, 9. At trial, counsel for Appellant again raised the issue of priority, asking the trial court to reconsider the prior entry of partial summary judgment and raising the issue of lien priority to preserve the issue for this appeal. Trans. at pp. 8-9, 57-58. The trial court entered judgment in favor of Respondent, affirming the ruling that

Appellant's lien was subordinate to Respondent's lien for condominium association fees. L.F. at 197. This appeal followed. L.F. at 203.

POINTS RELIED ON

I. **The trial court erred in ruling that Respondent's Assessment Lien had priority over Appellant's Deed of Trust because the statute providing for lien priority for condominium association assessments should be stricken as unconstitutionally vague and ambiguous in that the terms of the statute are so vague that a party is left to guess as to its meaning and application.**

§448.3-116 RSMo

Goerlitz v. City of Maryville, 333 S.W.3d 450 (Mo. 2011)

Reprod. Health Servs. Of Planned Parenthood of the St. Louis Region, Inc. v. Nixon, 185 S.W.3d 685 (Mo. 2006)

II. **The trial court erred in ruling Respondent's Assessment Lien had absolute priority over Appellant's Deed of Trust because the court misapplied the law in applying the *Carroll* case in that §448.3-116.2(4) RSMo is clearly applicable and provides for only a limited priority of six months' of assessments over a refinance deed of trust.**

§448.3-116 RSMo

Carroll v. Oak Hall Associates, L.P., 898 S.W.2d 603 (Mo.App. W.D. 1995)

In re Nocita, 914 S.W.2d 358 (Mo. 1996)

III. The trial court erred in granting Respondent's Assessment Lien complete priority because §448.3-116 RSMo is unconstitutionally vague in that by its terms, it provides that a condominium association lien be foreclosed as a deed of trust under Chapter 443 RSMo, yet the terms of Chapter 443 RSMo are irreconcilable with the terms of §448.3-116 RSMo.

§448.1-108 RSMo

§448.3-116 RSMo

In re Nocita, 914 S.W.2d 358 (Mo. 1996)

Reprod. Health Servs. Of Planned Parenthood of the St. Louis Region, Inc. v. Nixon, 185 S.W.3d 685 (Mo. 2006)

ARGUMENT

I. The trial court erred in ruling that Respondent's Assessment Lien had priority over Appellant's Deed of Trust because the statute providing for lien priority for condominium association assessments should be stricken as unconstitutionally vague and ambiguous in that the terms of

the statute are so vague that a party is left to guess as to its meaning and application.

The issue of whether a statute is constitutional is a question of law and subject to de novo review. *Ehlmann v. Nixon*, 323 S.W.3d 787, 788 (Mo. 2010). A statute is deemed constitutional and accordingly "'will not be invalidated unless it 'clearly and undoubtedly' violates some constitutional provision and 'palpably affronts fundamental law embodied in the constitution.'" *Id.* (citing *Board of Educ. of City of St. Louis v. State*, 47 S.W.3d 366, 368-69 (Mo. banc 2001)). A statute will be upheld as constitutional unless it clearly contravenes some constitutional provision. *Franklin County ex. rel. Parks v. Franklin County Comm'n.*, 269 S.W.3d 26, 29 (Mo. 2008).

A statute is unconstitutionally vague if it fails to give a person of average intelligence sufficient warning as to the prohibited behavior. *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Nixon*, 185 S.W.3d 685, 689 (Mo. 2006). If the terms used in the statute are of common usage and are understandable by persons of ordinary intelligence, then the statute will be upheld. *Id.*

As applied here, the language of §448.3-116 RSMo is clearly ambiguous and vague and should be stricken. §448.3-116 RSMo states as follows:

§ 448.3-116. Lien for assessments

1. The association has a lien on a unit for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes due. The association's lien may be foreclosed in like manner as a mortgage on real estate or a power of sale pursuant to chapter 443. Unless the declaration otherwise provides, fees, charges, late charges, fines, and interest charged pursuant to subdivisions (10), (11), and (12) of subsection 1 of section 448.3-102 are enforceable as assessments pursuant to this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.

2. A lien pursuant to this section is prior to all other liens and encumbrances on a unit except:

(1) Liens and encumbrances recorded before the recordation of the declaration;

(2) A mortgage and deed of trust for the purchase of a unit recorded before the date on which the assessment sought to be enforced became delinquent;

(3) Liens for real estate taxes and other governmental assessments or charges against the unit;

(4) Except for delinquent assessments or fines, up to a maximum of six months' assessments or fines, which are due prior to any subsequent refinancing of a unit or for any subsequent second mortgage interest.

This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association. The lien pursuant to this section is not subject to the provisions of section 513.475.

3. Unless the declaration provides otherwise, if two or more associations have liens for assessments created at any time on the same real estate, those liens have equal priority.

4. Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment pursuant to this section is required.

5. A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within three years after the full amount of the assessments becomes due.

6. This section shall not prohibit actions to recover sums for which subsection 1 of this section creates a lien, or prohibit an association from taking a deed in lieu of foreclosure.

7. A judgment or decree in any action brought pursuant to this section shall include costs and reasonable attorney's fees for the prevailing party.

8. The association shall furnish to a unit owner, upon written request, a recordable statement setting forth the amount of unpaid assessments against the unit owner's unit. The statement shall be furnished within ten business days after receipt of the request and is binding on the association, the executive board, and every unit owner.

§448.3-116 RSMo.

At issue in this case is Appellants refinance Note and Deed of Trust. As written, §448.3-116 RSMo is vague and ambiguous as to its application to a refinance deed of trust and its priority vis-à-vis a condominium association's lien for delinquent assessments. In relevant part, §448.3-116 RSMo states that a condominium's assessment lien "is prior to all other liens and encumbrances on a unit except: (4) Except for delinquent assessments or fines, up to a maximum of six months' assessments or fines, which are due prior to any subsequent refinancing of a unit or for any subsequent second mortgage interest." §448.3-116.2(4) RSMo. As enacted, this provision is unconstitutionally vague and ambiguous such that a person of ordinary intelligence is left to guess as to its application.

One interpretation might be that condominium liens are not superior to a maximum of six months of condominium liens that are due prior to a refinancing.

But this interpretation makes little sense. It is a circular reference. It appears to grant the condominium assessments priority over themselves. This interpretation would result in six months worth of liens that arose prior to a refinance being superior to all other condominium liens and then all other condominium liens having second priority. The end result is that the condominium liens still enjoy priority and Section 448.3-116.2(4) added nothing nor modified anything. The presumption is that the legislature had a purpose for adding Section 448.3-116.2(4) and the interpretation that six months worth of liens that arose prior to a refinance are superior to all other condominium liens with all other condominium liens having second priority makes subparagraph 4 meaningless. If this is the interpretation given to Section 448.3-116.2(4), one could strike subparagraph 4 and end with the same result.

Another interpretation of Section 448.3-116.2(4) may be that for condominium liens that arose prior to the date of the refinance only six months worth of assessments will have priority with the balance of assessments exceeding six months worth of assessments enjoying no priority. This interpretation is equally nonsensical. First, under this interpretation one is left questioning "priority as to what?" as the statute is silent on that issue. If it is priority as to the refinanced deed of trust, this interpretation would have the effect of limiting the level of priority condominium liens would enjoy. Without this statute,

condominium liens arising prior to a refinance would enjoy complete priority and would not be limited to six months. Not only does it not make sense why the legislature would intend to limit priority in this manner, it is inconsistent with the first part of the statute that states: "A lien pursuant to this section is prior to all other liens and encumbrances on a unit except:". §448.3-116.2 RSMo. The statute is clearly designed to provide priority to condominium liens except for specific situations contained in the subparagraphs of Section 448.3-116.2. An interpretation of subparagraph 4 that results in limiting the priority of a first in time lien is inconsistent with the purpose of the statute.

It further does not make sense that the legislature intended to limit condominium liens to six months that would have otherwise had absolute priority over refinance or second mortgages when Section 448.3-116.2(2) dealing with purchase money deeds of trust does not. A lender getting ready to take security in real property is in the position to guard against condominium liens that have not been satisfied. Title searches are performed and lenders routinely require that liens be satisfied in order that such liens do not take priority. An interpretation of the statute that shifts the burden of lien priority away from refinance lenders or second mortgage lenders by limiting first in time condominium liens to six months does not make sense.

In relevant part, the statute states that "[a] lien pursuant to this section is prior to all other liens and encumbrances on a unit *except: (4) Except for delinquent assessments or fines*, up to a maximum of six months' assessments or fines, which are due prior to any subsequent refinancing of a unit or for any subsequent second mortgage interest." §448.3-116.2(4) RSMo. (Emphasis added). The statue is impermissibly vague in that the "except, except" language utilized by the Legislature creates a patent ambiguity. This "except, except" language is completely obscure and unintelligible. By definition, previously delinquent assessments and fines become a lien on the property when they become due. §448.3-116.1 RSMo. Such a lien would have priority over a subsequently recorded refinancing or second mortgage loan. As such the "exception" set out in the statute is meaningless.

Eliminating the second "except" phrase does not cure the ambiguity and render this section meaningful. By eliminating the second "except" phrase, one is left with the language that a condominium lien is prior to other liens, except condominium liens, up to a maximum of six months' assessments or fines, which are due prior to any subsequent refinancing or second mortgage interest. *See* §448.3-116.2(4) RSMo. Eliminating the second "except" leads one right back to the interpretation issues discussed previously.

An additional interpretation of Section 448.3-116.2(4) is that the second "except" means that a condominium lien has priority except for such liens that are prior to a refinance or second mortgage. For condominium liens that are prior to a refinance or second mortgage six months assessments will not have priority to the refinance deed of trust or second mortgage. Here again the interpretation breaks down when one considers why refinance or second mortgages should be treated differently from first mortgages, or why the traditional lien priority rules would be amended.

To determine the intent and meaning of a statute, it must be read *in pari materia*, meaning that the entire statute must be reviewed in context to arrive at the true meaning and scope of the statute. *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 458 (Mo. 2011). §448.3-116.2 RSMo. provides for the first lien priority of a condominium association's assessments or fines, except for four instances: where the competing lien was recorded prior to the declarations of condominium, where the mortgage on the condominium unit is a purchase money mortgage recorded before the date on which the assessments became delinquent, liens for real estate taxes and other governmental assessments or charges, and "[e]xcept for delinquent assessments or fines, up to a maximum of six months' assessments or fines, which are due prior to any subsequent refinancing of a unit or for any subsequent second mortgage interest." §448.3-116.2 RSMo. The statute further specifically excludes

any affect on mechanic's liens or the priority of other liens for other assessments made by the association. *Id.*

Looking at this statute as a whole, the Legislature intended to grant a condominium association's liens priority over other liens, with a few exceptions. However, if one were to look at the language of subparagraph 4, relating to refinancing and second mortgage interests, the language is vague, open to multiple interpretations, some of which do not seem to carve out any exception.

Any attempt to interpret subparagraph 4 as relating to condominium liens that arose prior to a refinance deed of trust results in an interpretation that cannot be reconciled. However, the legislature gave guidance on how the statute should be construed. "Sections 448.1-101 to 448.4-120 shall be applied and construed so as to effectuate their general purpose to make uniform the law with respect to the subject of sections 448.1-101 to 448.4-120 among states enacting it." §448.1-110 RSMo. Any attempt to understand subparagraph 4 and the six months' priority necessarily requires exploring how the National Conference of Commissioners on Uniform State Laws' Uniform Condominium Act, and the states that have enacted a version of the six months' priority, treated that issue. The Uniform Condominium Act and states that have adopted a version of the Uniform Condominium Act provide a six month lien priority for condominium liens arising after the date of the deed of trust.

The National Conference of Commissioners on Uniform State Laws' Uniform Condominium Act (1980) is instructive in gleaning the Missouri Legislature's intent and purpose. *See Uniform Condominium Act (1980)*, National Conference of Commissioners on Uniform State Laws, (Approv'd. Feb. 14, 1987) (hereinafter referred to as the "1980 Uniform Act") at §3-116, attached hereto in the Appendix at A40-A49. Section 3-116 of the 1980 Uniform Act is markedly similar to §448.3-116 RSMo, as enacted by the Missouri Legislature. The 1980 Uniform Act does not distinguish between purchase money deeds of trust versus refinance first deeds of trusts. The 1980 Uniform Act provides that a condominium's lien for assessments has limited priority over a first deed of trust recorded prior to the date on which the assessments became delinquent. Said priority extends to the value of six months' assessments due immediately preceding institution of an action to enforce the assessment lien. *See* §3-116(b) 1980 Uniform Act, App. at A46-A47. The 1980 Uniform Act provides for a limited six months' assessments priority of the condominium association's lien over that of a previously recorded first deed of trust. This is further explained in Comment 2 of the 1980 Uniform Act, which states, in relevant part:

> as to prior first mortgages, the association's lien does have priority for 6 months' assessments based on the periodic budget. A significant departure from existing practice, the 6 months' priority for the assessment lien strikes

> an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of mortgage lenders.

§3-116 1980 Uniform Act, Comment 2, App. at A48. Several other states have also struck this six month compromise between the needs of the condominium association and the need to protect secured mortgage lenders. *See e.g.* Code of Ala. §35-8A-316(b) (2011); ALM GL ch. 183A, §6(c) (2011); Minn. Stat. §515A.3-115(a) (2011); N.J. Stat. §46:8B-21(b) (2012); 68 Pa.C.S. §3315(b) (2011); R.I. Gen. Laws §34-36.1-3.16(b) (2012); Rev. Code Wash. (ARCW) §64.34.364(3) (2011); W. Va. Code §36B-3-116(b) (2011); Tenn. Code Ann. §66-27-415(b) (2011). App. at A20-A38.

The language employed in §3-116 of the Uniform Act is nearly identical to the language used by the Missouri Legislature in §448.3-116 RSMo. The Missouri legislature clearly was looking to the 1980 Uniform Act when it was adopting §448.3-116 RSMo. The Missouri legislature expressly instructed that its goal was to adopt the Uniform Condominium Act and that Missouri's statutes in this regard are to be construed accordingly. §448.1-110 RSMo. Prior to 1998, the only mortgage interest that had priority over a condominium association's lien was that of a purchase money mortgage. *See* §448.3-116.2 RSMo. *See also,* App. at A62-A63. In 1998, the Missouri Legislature added subparagraph 4 to subsection 2 of

§448.3-116 RSMo. *See* SB 852, App. at A50, A62. This added the exception wherein a condominium association has priority over a refinancing or second mortgage lien, but only to the extent of six months' worth of delinquent assessments or fines. The only reasonable interpretation of §448.3-116.2(4) in light of the 1980 Uniform Act is that the legislative intent was to allow for a six month condominium lien priority over refinance deeds of trust recorded prior to the association lien.

In the alternative §448.3-116 RSMo should be stricken in its entirety. This statute is drafted in such a confusing and vague manner, that a person of ordinary intelligence can be led to several interpretations. §448.3-116 RSMo should therefore be stricken as unconstitutionally vague. *Nixon*, 185 S.W.3d at 689. Any person of ordinary intellect is necessarily confused by the language set out in §448.3-116.2(4) RSMo as to how to interpret or apply it. *Nixon*, 185 S.W.3d at 689. It is clear the legislature identified the need in 1998 to address priority between refinance deeds of trust and condominium liens when it enacted §448.3-116.2(4) RSMo. Striking only subparagraph 4 will make every deed of trust that is not a purchase money deed of trust subject to being extinguished for even the smallest of condominium assessment. To protect non purchase money deed of trust holders as to their lien interest in the property the entirety of §448.3-116 must be stricken as unconstitutionally vague. *Nixon*, 185 S.W.3d at 689.

II. The trial court erred in ruling Respondent's Assessment Lien had absolute priority over Appellant's Deed of Trust because the court misapplied the law in applying the *Carroll* case in that §448.3-116.2(4) RSMo is clearly applicable and provides for only a limited priority of six months' of assessments over a refinance deed of trust.

The review of a trial court's application of a statute constitutes an interpretation of a statute, which is reviewed *de novo*. *Montgomery v. Wilson*, 331 S.W.3d 332, 338 (Mo.App. W.D. 2011).

In granting Respondent's motion for partial summary judgment, the trial court granted Respondent's condominium lien complete priority over Appellant's prior recorded deed of trust. In doing so, the trial court misapplied the law in that §448.3-116.2(4) RSMo provides that a condominium association's lien has only limited priority of up to six months' assessments. §448.3-116.2(4) RSMo states in relevant part that:

> 2. A lien pursuant to this section is prior to all other liens and encumbrances on a unit except:
>
> (4) Except for delinquent assessments or fines, up to a maximum of six months' assessments or fines, which are due prior to any subsequent refinancing of a unit or for any subsequent second mortgage interest.

§448.3-116.2(4) RSMo. (Emphasis added).

In reaching its ruling, the trial court relied on the case of *Carroll v. Oak Hall Associates, L.P.*, 898 S.W.2d 603 (Mo.App. W.D. 1995) to rule that Respondent's condominium lien had complete priority. L.F. at 155-156. However, the *Carroll* case is inapplicable in this case. In *Carroll*, a purchase money lien holder was seeking to protect its lien interest. At issue was whether Missouri's prior condominium law applied or if the new Uniform Condominium Act would apply. If the older condominium law applied, then the condominium association had priority as the secured lender's deed of trust did not contain the statutorily mandated language in order to establish itself as a first lien on the property. This is not an issue in the case before the Court. Because the lien holder's deed of trust was recorded prior to the enactment of the Uniform Condominium Act, the *Carroll* court ruled that the prior act governed the question of priority. *Carroll*, 898 S.W.2d at 607. In reaching this ruling, the *Carroll* court determined that parties are deemed to enter into contracts in contemplation of the law as it then existed and "it is sometimes said that the existing law is a part of the contract as if it were written therein." *Id.* The *Carroll* court then briefly addressed a junior lien holder and noted that, though it was recorded after the enactment of the Uniform Condominium Act, "[i]t was admittedly not a purchase money deed of trust, and

therefore [had] no claim to priority over the common expenses lien." *Carroll*, 898 S.W.2d at 608.

The trial court seized on the *Carroll* court's language regarding the junior refinance deed of trust, and declared that Respondent's lien had priority. L.F. at 155. However, the trial court's reliance on *Carroll* is misplaced. The *Carroll* court never reached the issue of the relative priority of a refinancing deed of trust under §448.3-116.2(4) RSMo. Principally because this subsection of §448.3-116 did not exist at the time the *Carroll* case was rendered. The *Carroll* decision was made in 1995. However, in 1998, the Missouri Legislature amended §448.3-116 RSMo via Senate Bill 852. 1998 Mo. SB 852 (attached in the Appendix hereto at page A50). SB 852 added subparagraph 4 to carve out an exception to protect non-purchase money lien holders by granting condominium associations only limited priority as to six months' of assessments. *See* Appendix (hereinafter "App.") at A62. Prior to 1998, only purchase money deeds of trust enjoyed priority over a condominium lien. By enacting SB 852, the Missouri Legislature clearly intended to extend lien priority protection to non-purchase money liens by granting such liens priority, but subject to six months' worth of delinquent condominium association dues or fines. This brings the Missouri Uniform Condominium Act more in line with the Uniform Act, as drafted by the National Conference of Commissioners on Uniform State Laws.

The National Conference of Commissioners on Uniform State Laws' Uniform Condominium Act (1980) is instructive in gleaning the Missouri Legislature's intent and purpose. *See Uniform Condominium Act (1980)*, National Conference of Commissioners on Uniform State Laws, (Approv'd. Feb. 14, 1987) (hereinafter referred to as the "1980 Uniform Act") at §3-116, attached hereto in the Appendix at A40-A49. Section 3-116 of the 1980 Uniform Act is markedly similar to §448.3-116 RSMo, as enacted by the Missouri Legislature. The 1980 Uniform Act does not distinguish between purchase money deeds of trust versus refinance first deeds of trusts. The 1980 Uniform Act provides that a condominium's lien for assessments has limited priority over a first deed of trust recorded prior to the date on which the assessments became delinquent. Said priority extends to the value of six months' assessments due immediately preceding institution of an action to enforce the assessment lien. *See* §3-116(b) 1980 Uniform Act, App. at A46. The 1980 Uniform Act provides for a limited six months' assessments priority of the condominium association's lien over that of a previously recorded first deed of trust. This is further explained in Comment 2 of the 1980 Uniform Act, which states, in relevant part:

> as to prior first mortgages, the association's lien does have priority for 6 months' assessments based on the periodic budget. A significant departure from existing practice, the 6 months' priority for the assessment lien strikes

an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of mortgage lenders.

§3-116 1980 Uniform Act, Comment 2, App. at A48. Several other states have also struck this six month compromise between the needs of the condominium association and the need to protect secured mortgage lenders. *See e.g.* Code of Ala. §35-8A-316(b) (2011); ALM GL ch. 183A, §6(c) (2011); Minn. Stat. §515A.3-115(a) (2011); N.J. Stat. §46:8B-21(b) (2012); 68 Pa.C.S. §3315(b) (2011); R.I. Gen. Laws §34-36.1-3.16(b) (2012); Rev. Code Wash. (ARCW) §64.34.364(3) (2011); W. Va. Code §36B-3-116(b) (2011); Tenn. Code Ann. §66-27-415(b) (2011). App. at A20-A38.

The language employed in §3-116 of the Uniform Act is nearly identical to the language used by the Missouri Legislature in §448.3-116 RSMo. The Missouri legislature clearly was looking to the 1980 Uniform Act when it was adopting §448.3-116 RSMo. Prior to 1998, the only mortgage interest that had priority over a condominium association's lien was that of a purchase money mortgage. *See* §448.3-116.2 RSMo. *See also,* App. at A62. In 1998, the Missouri Legislature added subparagraph 4 to subsection 2 of §448.3-116 RSMo. *See* SB 852, App. at A63. This added the exception wherein a condominium association has priority over a refinancing or second mortgage lien, but only to the extent of six months'

worth of delinquent assessments or fines. The only reasonable interpretation of §448.3-116.2(4) in light of the 1980 Uniform Act is that the legislative intent was to allow for a six month condominium lien priority for refinance deeds of trust recorded prior to the association lien. To provide a condominium lien priority for liens recorded prior to the deed of trust is meaningless as those liens enjoyed full priority without the additional legislation provided for by §448.3-116.2(4).

The trial court never reached §448.3-116.2(4) RSMo, and instead relied on the *Carroll* decision to determine that Appellant's lien was completely junior to that of Respondent's. L.F. at 155. In doing so, the trial court committed error because it misapplied the law. §448.3-116.2(4) RSMo. was enacted for a reason. The trial court's ruling robs §448.3-116.2(4) RSMo. of all effect and reason in that the trial court's ruling completely disregards the application of only six months' of priority to a condominium lien over a refinancing mortgage. The trial court's ruling is that unless one holds a purchase money deed of trust, recorded prior to the delinquency of the assessments on which enforcement is sought, a condominium lien has complete priority with respect to mortgage liens. *Carroll* never addressed §448.3-116.2(4) RSMo because this subparagraph was not enacted until 1998, after the *Carroll* decision was entered in 1995. App. at A50; *Carroll*, 898 S.W.2d at 603. In relying on *Carroll* and not addressing §448.3-116.2(4) RSMo, the trial court robbed this provision of all effect and misapplied the law.

The court's primary role in statutory interpretation is to give effect to the legislative intent as reflected in the plain language of the statute. *See Parktown Imports, Inc. v. Audi of America, Inc.* 278 S.W.3d 670, 672 (Mo. 2009). Further, every clause, word and provision of a statute is presumed to have meaning and effect. *Neske v. City of St. Louis*, 218 S.W.3d 417, 424 (Mo. 2007). It is further presumed that the Legislature did not insert idle or superfluous language into statutes. *Civil Service Commission of the City of St. Louis v. Members of the Board of Aldermen of the City of St. Louis*, 92 S.W.3d 785, 788 (Mo. 2003). Therefore, the trial court erred in not looking further into §448.3-116.2(4) RSMo to give effect to the legislative intent expressed therein.

Each word and phrase of a statute is deemed to have meaning. *Neske*, 217 S.W.3d at 424. As such, the phrases and contents of §448.3-116.2(4) RSMo have meaning. *Id.* Admittedly, as drafted by the Legislature, §448.3-116.2(4) RSMo is ambiguous and difficult to interpret. However, as the Legislature is deemed not to insert superfluous language (*see Civil Service Comm'n of the City of St. Louis*, 92 S.W.3d at 788), then it must be read that §448.3-116.2(4) provides that a condominium lien is superior to all other non-purchase money liens, but only to the extent of six months' worth of assessments. To read this provision otherwise, would rob it of all efficacy. Respondent would have the statute interpreted such that the six month limited priority only applies to those fines and assessments that

are delinquent prior to any mortgage refinancing. *See* L.F. at 176. Per §448.3-116.1 RSMo, a condominium lien attaches when the assessments become due. Such a lien would have priority over a subsequently recorded refinancing of second mortgage. The "exception" of lien priority created by subparagraph 4 is meaningless as the condominium association would already have lien priority. It does not make sense that the legislature intended to limit condominium liens to six months that would have otherwise had absolute priority over refinance or second mortgages when Section 448.3-1162(2) RSMo, dealing with purchase money deeds of trust, does not. A lender getting ready to take security in real property is in the position to guard against condominium liens that have not been satisfied. Title searches are performed and lenders routinely require that liens be satisfied in order that such liens do not take priority. An interpretation of the statute that shifts the burden of lien priority away from refinance lenders or second mortgage lenders by limiting first in time condominium liens to six months does not make sense.

"When 'construing uniform and model acts enacted by the General Assembly, [the Court] must assume it did so with the intention of adopting the accompanying interpretations placed thereon by the drafters of the model or uniform act.'" *In re Nocita*, 914 S.W.2d 358, 359 (Mo. 1996). (Citing *John Deere Co. v. Jeff DeWitt Auction Co.*, 690 S.W.2d 511, 514 (Mo.App. 1985)) (citing *State v. Anderson*, 515 S.W.2d 534, 539 (Mo. banc 1974)). Accordingly, the comments

accompanying a uniform code when adopted have great weight in construing the statute. *Id.* As set forth above, and more fully set forth in the Appendix to this Brief, the drafters of the uniform code clearly intended to strike a balance between the needs of secured mortgage lenders and the needs of condominium associations by granting the condominium associations limited priority over a previously recorded deed of trust, but to the extent of six months' of delinquent assessments. *See* §3-116 1980 Uniform Act, Comment 2, App. at A48. To great extent, the Missouri Uniform Condominium Act at §448.3-116 RSMo mirrors §3-116 of the 1980 Uniform Act. As such the comments of the drafters of the 1980 Uniform Act are instructive in interpreting the Missouri Uniform Condominium Act, such that there is a clear preference to give a condominium association's lien priority, but only to the extent of six months' of assessments.

It is clear that the Missouri Legislature realized that the prior enactment of §448.3-116 RSMo only protected purchase money deeds of trust, in contravention of the goals and compromises struck in the 1980 Uniform Act. Prior to 1998, there was no provision addressing refinancing deeds of trust and offering them some protection as to their lien priority. This was addressed by the Legislature in 1998 by Mo. SB 852, which added subparagraph 4 to subsection 2, calling for the condominium assessments to have only a limited six months' of assessments priority over refinance deeds of trust. *See* 1998 Mo. SB 852, attached in the

Appendix at A50. Thus, however poorly drafted, there was a clear intention to bring §448.3-116 RSMo in compliance with §3-116 of the 1980 Uniform Act. *See Nocita*, 914 S.W.2d at 359.

Accordingly, the only way to read §448.3-116.2(4) RSMo which grants it the greatest effect is in line with the 1980 Uniform Act, which provides for a limited six months' priority for condominium assessment liens. *See* §3-116 1980 Uniform Act at A46; §3-116, Comment 2, 1980 Uniform Act, App. at A48. Therefore, the trial court's partial summary judgment ruling should be reversed and remanded with instruction that Appellant's lien has priority, but for six months' worth of assessments which were due immediately prior to the filing of Respondent's suit.

III. The trial court erred in granting Respondent's Assessment Lien complete priority because §448.3-116 RSMo is unconstitutionally vague in that by its terms, it provides that a condominium association lien be foreclosed as a deed of trust under Chapter 443 RSMo, yet the terms of Chapter 443 RSMo are irreconcilable with the terms of §448.3-116 RSMo.

Section 448.3-116.1 RSMo provides that a condominium association's lien may be foreclosed in like manner as a power of sale foreclosure under Chapter 443 of the Revised Statutes of Missouri. Chapter 443 sets forth in great detail the

rights and procedures in connection with foreclosing non-judicially under a power of sale in a deed of trust. Chapter 443 does not address the requirements or procedures for foreclosing a condominium lien non-judicially. The requirements set out in Chapter 443 for foreclosing a deed of trust under a power of sale cannot be reconciled with the right granted by §448.3-116.1 allowing for a power of sale foreclosure for a condominium lien.

Before we address the specific provisions of Chapter 443 that cannot be reconciled with §448.3-116.1, several general provisions and principles of Missouri's Uniform Condominium Act must be noted. First, except to the extent specifically abrogated by the Act, relevant common law continues to apply to condominium properties in Missouri. § 448.1-108 RSMo. Specifically, the legislature set forth that "the law of real property and the law relative to capacity to contract" "supplement the provisions of sections 448.1-101 to 448.4-120". Second, § 448.1-110 RSMo provides that §§448.1-101 to 448.4-120 shall be applied and construed so as to effectuate their general purpose to make uniform the law with respect to the subject of sections 448.1-101 to 448.4-120 among states enacting it. From these two provisions, we know that the Act was enacted into law not to displace common law principles and existing real property law, but to keep them intact where possible. We also know that the general purpose of its enactment was to bring Missouri in line with other states enacting the Uniform

Condominium Act as set forth by the National Conference of Commissioners on Uniform State Laws. These two points can not be denied.

Unfortunately, the legislative process sometimes results in legislation that doesn't do that which was intended. If it was the intent of the legislature to "make uniform the law" "among states enacting it" (and its stated purpose states clearly that it was), then we can safely say that the language used in §448.3-116.1 can neither be reconciled with the Uniform Act written by the National Conference of Commissioners nor can it be reconciled with those states which have enacted it. As is set forth below, it also can not be reconciled with Chapter 443.

From a constitutional perspective, this creates a fatal defect. There is a presumption that legislatures do not intend to violate organic law of the state. *State ex rel. McClellan v. Godfrey*, 519 S.W.2d 4, 8 (Mo. 1975). And the legislature, in enacting §§448.1-101 to 448.4-120 clearly stated that it was their intention to keep Missouri common law in place… "except to the extent specifically abrogated by the Act." To the extent that §448.3-116.1 RSMo inadvertently contradicts and overturns over a century of case law with respect to non-judicial foreclosure sales, §448.3-116.1 is constitutionally defective. It is so because stating that a condominium lien can be foreclosed in like manner to a deed of trust, when such statement can not withstand scrutiny, results in vagueness and due process concerns that are fatal.

The primary rule of statutory construction is to give effect to the intent of the legislature. *Spradlin v. City of Fulton*, 982 S.W.2d 255, 258 (Mo. banc 1998). Where general terms in one part of a statute are inconsistent with specific terms in another part, the specific terms are controlling, "unless the statute as a whole clearly shows the contrary intention." *Terminal R.R. Ass'n of St. Louis v. City of Brentwood*, 360 Mo. 777, 230 S.W.2d 768, 769 (Mo. 1950); *Ronnoco Coffee Co. v. Dir. of Revenue*, 185 S.W.3d 676, 683 (Mo. 2006)

Here, the casual insertion of language purporting to create a right to non-judicial foreclosure of a condominium lien results in the inability to determine what provisions of Chapter 443 are meant to be adopted by §443-116.1 and what provisions are not. The words "in like manner" are not defined nor are they susceptible to rational interpretation where Chapter 443 is so ill suited for any "like manner" application. As will be set forth below, the fact that there is no trustee, no power of sale, no recorded deed of trust, and no notice protections, inter alia, create infirmities in law and application that prevent Respondent from determining what acts are proscribed or required of itself or a person attempting to conduct a non-judicial foreclosure sale in connection with a non-judicial foreclosure of a condominium lien. If the provision is not defined, the provision is violative of the void for vagueness doctrine in that there must be guidelines for those seeking to utilize and enforce the act complained of in order to prevent arbitrary and

discriminatory application. *State v. Brown*, 660 S.W.2d 694, 697 (Mo. banc 1983). Simply put, one must be able to make some judgment as to how to apply the statute. Here, that can not be done. Because it can not be done, Appellant can not protect its property interest in any meaningful way. What follows are specific examples of how Chapter 443 directly contradicts the language of §448.3-116.1 as to foreclosing a condominium lien in a "like manner" to a mortgage on real estate sale.

Chapter 443 contains specific publication notice requirements for a foreclosure. The requirements are that the publication notice "shall set forth the date and book and page of the record of such mortgages or deeds of trust" that is to be foreclosed. §443.320 RSMo. A condominium lien arises solely as a result of state statute. *See* §448.3-116.1 RSMo. "The association has a lien on a unit for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes due." *Id.* "Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment pursuant to this section is required." §448.3-116.4 RSMo. There is no requirement under §448.3-116.4 to record the lien. Even if a lien is recorded, a lien is not a mortgage or deed of trust. As such, there is no recorded mortgage or deed of trust for which a date, book and page can be

published as required by §443.320 RSMo. Therefore, the notice can not provide the date, book and page of record in compliance with §443.320 RSMo.

Chapter 443 goes on to state that individual notice of sale must be given to owners of the property and junior lien holders that have requested for a notice of sale. §443.325 RSMo. The individual notice of sale must contain the information required in the published notice of sale referred to in §443.320. For the same reasons that Chapter 443 publication requirements cannot be met for condominium lien foreclosures, the individual notice of sale cannot be met for condominium lien power of sale foreclosures. Condominium liens need not be recorded. Condominium liens are not mortgages or deeds of trust. The requirement to provide individual notice of the date, book and page of the mortgage or deed of trust to be foreclosed cannot be fulfilled when foreclosing a condominium lien under a power of sale pursuant to §448.3-116.1.

A power of sale foreclosure under Chapter 443 has to be conducted by a trustee under a deed of trust. Under the condominium statutes there is no trustee vested with the power to foreclose non-judicially. Section 448.3-116.1 does not define who has the power to act as trustee for foreclosure purposes. In fact, though §443.3-102 does enumerate powers of unit owners' association, nowhere in those enumerated powers is the power to act as trustee in a non-judicial foreclosure sale of its own lien. Chapter 443 looks to the deed of trust to determine who has the

power to exercise the power of sale rights. The foreclosure by anyone other than the trustee is void. *Citizens Bank of Edina v. West Quincy Auto Auction, Inc.*, 742 S.W.2d 161, 162 (Mo. banc 1987); *Winters v. Winters*, 820 S.W.2d 694, 698 (Mo.App. 1991). Chapter 443 RSMo makes numerous references and imposes requirements on the trustee under a deed of trust. Not the least of which requirements is that the trustee give notice of the foreclosure sale. §443.320 RSMo. It is the trustee under the deed of trust that exercises the power of sale and sets the time of sale. §443.327 RSMo.

As stated above, to foreclose under the power of sale in a deed of trust, under the provisions of Chapter 443 RSMo, there must be a trustee. There is no trustee to enforce the foreclosure of a condominium assessment lien. A trustee under a deed of trust acts in a fiduciary capacity and must act with honesty, integrity and impartiality toward both the creditor and the debtor in executing the sale. *Spires v. Edgar*, 513 S.W.2d 372, 378 (Mo. 1974). However, there is no comparable person under the foreclosure of a condominium assessment lien. The condominium association does not have a like fiduciary duty as does a trustee under a deed of trust. As such, there is no one in a position to oversee that the assessment lien foreclosure is properly conducted. Unlike in the foreclosure of a deed of trust, where the trustee owes fiduciary duties to the parties, a condominium association has no one to be held accountable in the event the assessment lien

foreclosure is mishandled. As such, the foreclosure of a condominium assessment lien can not be conducted in like manner as under the provisions of Chapter 443 RSMo.

There is a presumption of validity, such that, unless two statutes are irreconcilably inconsistent, both statutes will stand. *See In re Nocita*, 914 S.W.2d at 359. Where one statute deals with a topic in general terms and the other deals in a specific way, to the extent they conflict, the specific statute prevails. *See Turner v. Sch. Dist. Of Clayton*, 318 S.W.3d 660, 668 (Mo. 2010). Section 448.3-116.1 RSMo does not define how a power of sale foreclosure of a condominium lien is to be conducted. Rather it states it is to be conducted "in a like manner as a mortgage on real estate or power of sale pursuant to chapter 443". *See* §448.3-116.1 RSMo. Chapter 443 on the other hand defines with great specificity how a deed of trust foreclosure under a power of sale is to be conducted. Therefore, Section 448.3-116.1 RSMo is the general statute. The power of sale provisions in §448.3-116.1 RSMo cannot be reconciled with the specific requirements of Chapter 443. Therefore, §448.3-116.1 must fail and be struck.

The constitutionality of a statute is a matter of de novo review. *Ehlmann v. Nixon*, 323 S.W.3d at 788. A statute is deemed constitutional and "'will not be invalidated unless it 'clearly and undoubtedly' violates some constitutional provision and 'palpably affronts fundamental law embodied in the constitution.'"

Id. (citing *Board of Educ. of City of St. Louis v. State*, 47 S.W.3d 366, 368-69 (Mo. banc 2001)). A statute will be upheld as constitutional unless it clearly contravenes some constitutional provision. *Franklin County ex. rel. Parks v. Franklin County Comm'n.*, 269 S.W.3d 26 at 29.

Section 448.3-116 RSMo. is unconstitutional because the right it grants to foreclose the condominium lien as a power of sale under Chapter 443 is vague and not subject to any interpretation that is consistent with the requirements of Chapter 443.

The statutes are further irreconcilable in that the power to foreclose non-judicially in Missouri arises as a matter of contract set out in the power of sale in the deed of trust. *See* §443.327 RSMo. If the deed of trust omits the language providing for a power of sale in the trustee, then the deed of trust can not be foreclosed non-judicially. *Id.* The power of sale under a deed of trust is contractual and does not exist independently of such a contractual agreement expressed in the deed of trust. *Winters v. Winters*, 820 S.W.2d at 696; *Spires v. Lawless*, 493 S.W.2d 65, 69 (Mo.App. 1973). In contrast, the power to foreclose under a condominium association assessment lien arises from statute. *See Brask v. Bank of St. Louis*, 533 S.W.2d 233 (Mo. App. 1975); *See* §448.3-116 RSMo. Because the power to foreclose a condominium lien arises from statute, the non-judicial foreclosure provision of Chapter 443 RSMo can not be applied to the

foreclosure of a condominium assessment lien. The non-judicial foreclosure under Chapter 443 RSMo. and all of the case law supporting any power to foreclose non-judicially is predicated on there being a power of sale set out in the deed of trust. Without the contractual power of sale, there is no power to non-judicially foreclose on a deed of trust. The power to foreclose a condominium assessment lien arises from statute. The efficacy of the foreclosure of a condominium's assessment lien arises from statute. *See Carroll v. Oak Hall Assocs., LP*, 898 S.W.2d 603, 606 (Mo.App. 1995). As a condominium association's power to foreclose arises by statute, rather than by matter of contract, then it is impossible to foreclose a condominium lien under the provisions of Chapter 443 RSMo as the non-judicial foreclosure provisions of Chapter 443 RSMo are directly related to a contractual power of sale.

Section 448.3-116 RSMo, because it contradicts Chapter 443, is also unconstitutionally vague in that non-judicial foreclosure sales pursuant to Chapter 443 have been consistently held to be matters of private contract pursuant to the mandatory "power of sale" clauses included in deeds of trust and, therefore, not subject to the due process requirements of the 14th Amendment of the United States Constitution and Article 1, Section 10 of the Missouri Constitution, as to the unconstitutional taking of rights from a secured lien holder or owner of property. The condominium assessment lien arises, not through contract or agreement, but

by statute under the provisions of the Missouri Uniform Condominium Act. *See Brask*, 533 S.W.2d 233; *Carroll*, 898 S.W.2d at 606. Compare this to the lien that arises from the recording of a deed of trust. The lien and right to foreclose a deed of trust is a contractual right, arising from the power of sale provision of a deed of trust. *Federal National Mortgage Association v. Howlett*, 521 S.W.2d 428, 432 (Mo. banc 1975). The analysis of whether the lien for condominium assessments constitutes state action as the assessment lien arises as a result of statute (as opposed to arising by nature of a contractual power of sale), is a consideration that arises solely because the legislature has attempted to provide for an avenue of recovery and property conveyance to an entity that does not fit within the traditional notions of property law in Missouri with regard to deeds of trust. It is an attempt that is rife with problems and irreconcilable differences. *See Howlett*, 521 S.W.2d at 433.

The only requirement for a condominium lien to be imposed is that it become due. "The association has a lien on a unit for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes due." §448.3-116.1 RSMo. There is no other notice or recording requirement that the condominium association must meet. *Id.* There is no requirement that any notice of delinquent assessments be recorded or placed of public record. §448.3-116 RSMo. Rather, the recording of the declaration is

considered notice and perfection of the lien. §448.3-116.4 RSMo. However, there is no actual lien until such time as the assessment or fine becomes due. §448.3-116.1 RSMo.

Because of the lack of a trustee and the duties associated therewith, the procedural safeguards and duties attendant to a power of sale foreclosure are not present in connection with a non-judicial foreclosure of a condominium lien. The rights at stake in this litigation are significant property rights. It is unclear what rights Appellant would have were a non-judicial foreclosure sale conducted of a condominium lien if any traditional safeguards or duties were violated in the execution of said sale. Appellant would have difficulty suggesting any breach of fiduciary duty because there is no trustee. It can be argued that because there is now state action authorizing the sale rather than contractual power of sale, a due process analysis is now appropriate. The mere fact that this is a question supports the conclusion that these two statutes can not be reconciled.

Therefore, in contrast to a deed of trust or second mortgage that is placed of record with stated amounts delineating the extent of the lien, the legislature created a new lien that can be foreclosed non-judicially, without any procedural safeguards, without any safeguards created by case law, and without any guidance as to how any of these contradictions can be reconciled. The failure to do so results in a statute that is so devoid of rational interpretation and guidance that it is

void for vagueness. "Where terms or words used in a statute or regulation such as the word "sponsoring" here, are of such uncertainty in meaning, or are so confused that a court cannot determine with reasonable certainty what is intended, the provision is void." *See Prokopf v. Whaley*, 592 S.W.2d 819, 826 (Mo. banc 1980); *Ferguson Police Officers Assoc. v. Ferguson*, 670 S.W.2d 921, 928 (Mo. Ct. App. 1984)

Section 448.3-116 should be stricken in its entirety. This statute is not only drafted in such a confusing and vague manner that a person of ordinary intelligence can be led to several interpretations, but it is also drafted in a way that can not be reconciled with Chapter 443 or the case law interpreting same. Because one can not reconcile the two statutes, and because the failure to do so results in Appellant being unable to adequately determine how it should act to protect its property interest or determine the appropriate course of action, §448.3-116 RSMo should be stricken as unconstitutionally vague. *Nixon*, 185 S.W.3d at 689. Although the legislature casually granted a right to foreclose in "like manner", the failure to make any further effort as to how that might occur is fatal. To protect non purchase money deed of trust holders as to their lien interest in the property the entirety of §448.3-116 must be stricken as unconstitutionally vague. *Nixon*, 185 S.W.3d at 689.

CONCLUSION

The trial court's entry of judgment in favor of Respondent should be reversed and remanded with instructions that Appellant be awarded a first lien on the Property. As shown above, §448.3-116 RSMo. is unconstitutionally vague, such that it should be stricken by the Court. The Missouri Legislature's use of the "except, except" language, and the phrasing set out in §448.3-116.2(4) RSMo. is so ambiguous, confusing and misleading that no person of ordinary intelligence can possibly consistently interpret the statute. The "except, except" language adopted by the Legislature is patently ambiguous and vague, such as to render the statute unconstitutional. As §448.3-116 RSMo. is unconstitutional, the condominium association can have no lien. §448.3-116 RSMo. is the section of the Missouri Uniform Condominium Act which establishes a lien in favor of the condominium association for delinquent assessments and fines. Because §448.3-116 RSMo. is unconstitutionally vague as to be stricken by the Court, there is no provision for a lien in favor of the Respondent. As a result, Appellant's lien must have priority.

In addition, §448.3-116 RSMo. is unconstitutional and should be stricken in that the general provisions that a condominium lien be foreclosed in like manner under the provision of Chapter 443 RSMo. can not be reconciled with the specific provisions

Further, should this Court determine that §448.3-116 RSMo. is not unconstitutionally vague, Appellant's deed of trust still has priority, but for six months' worth of delinquent condominium assessments and fines. The Missouri Uniform Condominium Act is modeled in great part on the 1980 Uniform Condominium Act, particularly with respect to §3-116 of the 1980 Uniform Act. As such, great deference should be granted to the comments adopted by the drafters of the 1980 Uniform Act. As noted in Comment 2 of the 1980 Uniform Act, the drafters of the uniform act intended to strike a compromise between the interests of a mortgage lender and the condominium association. The compromise that was reached was to give a condominium association's lien priority over those of prior recorded liens, but only to the extent of six months' of delinquent assessments. The Missouri Legislature attempted to do the same, albeit via the more awkward phrasing adopted in §448.3-116.2(4) RSMo. Accordingly, the trial court's partial summary judgment should be reversed and remanded with instructions that Appellant's deed of trust be awarded priority over Respondent's lien for assessments, except to the extent of six months' worth of assessments due as of the date Respondent filed suit.

The trial court's judgment should be reversed on the further basis that the *Carroll* case, on which the trial court relied, is clearly inapplicable in that the *Carroll* case preceded the enactment of §448.3-116.2(4) RSMo. and as such has no

precedential value in applying §448.3-116.2(4) RSMo. The *Carroll* case did not and could not demonstrate how the six months' assessments provision of §448.3-116.2(4) RSMo. applies to the case at bar and did not reach this statutory provision. As a result, the trial court's reliance on *Carroll* was misplaced and was a misapplication of the law, such that the trial court's ruling should be reversed and remanded, with instruction that Appellant's deed of trust be awarded priority over the Respondent condominium association's lien, except for six months' worth of assessments.

Further, §448.3-116 RSMo. should be stricken as it is unconstitutionally vague in that the specific foreclosure provisions of Chapter 443 RSMo can not be reconciled with the general directive that a condominium association lien be foreclosed "in like manner" to a foreclosure under the power of sale set out in a deed of trust. This gives further rise to due process issues as the due process protections specifically set out in the foreclosure of a power of sale under a deed of trust are not present and can not be imputed to the foreclosure of a condominium association's lien for assessments.

For the reasons set forth above and in the Argument portion of this Brief, the trial court's judgment should be reversed and remanded, and the trial court ordered to enter judgment awarding Appellant's deed of trust to have priority over Respondent's assessments lien, with the exception of six months' worth of

assessments. Appellant further prays for such further and additional rulings and orders as this Court deems just and proper.

Respectfully submitted,

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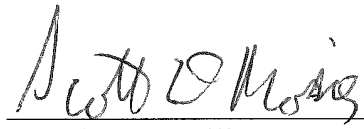
By: 

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CERTIFICATE OF COMPLIANCE WITH
MISSOURI SUPREME COURT FULE 84.06(b) and (c)

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to the word count function on Microsoft Office Word, by which it was prepared, contains 10,026 words.

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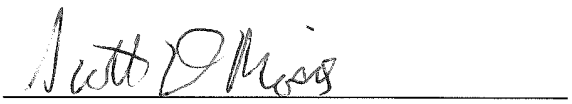
By: 

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CERTIFICATE OF SERVICE

Comes now, the undersigned, and hereby certifies that on January 28, 2013, an electronic version of this Appellant's Brief and the accompanying Appendix were submitted to the Clerk of the Supreme Court for filing by using the Court's electronic filing system. The undersigned further understands that by so filing electronically, service is accomplished on all attorneys of record.

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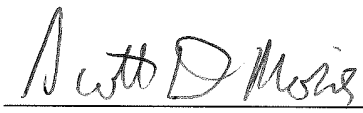
By: 

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